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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-372

No. COA21-308

Filed 17 May 2022

Union County, No. 19-CRS-054744

STATE OF NORTH CAROLINA,

v.

CALIXTO GONZALEZ MALDONADO, Defendant.

Appeal by Defendant from order entered 4 January 2020 by Judge Jeffery K. Carpenter in Union County Superior Court. Heard in the Court of Appeals 12 January 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Kayla D. Britt, for the State.

Joseph P. Lattimore for the Defendant.

JACKSON, Judge.

¶ 1 Calixto Gonzalez Maldonado ("Defendant") appeals the denial of his motion to suppress, seeking review through a petition for writ of certiorari. Because Defendant has failed to demonstrate that his appeal is meritorious, in our discretion we deny the petition and dismiss Defendant's appeal.

I. Background

¶ 2 This case deals with a narcotics investigation that resulted in Defendant's arrest in the parking lot of a Union County Harris Teeter. On 18 November 2019, Detective C. Little of the Union County Sheriff's Office set up a drug bust with confidential informant, L. Newsome ("Ms. Newsome"). Ms. Newsome had reliably worked as an informant for Detective Little on several prior occasions, and Ms. Newsome approached Detective Little about a potential heroin source who would be willing to sell to her. Detective Little asked Ms. Newsome to tell her source, an anonymous third party, to have the drug runner meet at the Harris Teeter on Idlewild Road.

¶ 3 Detective Little and his colleagues from the Union County Sheriff's Department waited in the Harris Teeter parking lot, all the while exchanging texts with Ms. Newsome on the runner's whereabouts. Ms. Newsome described the runner as a "Hispanic male" and notified Detective Little that a "brown Ford Taurus" would be arriving in "seven minutes" to the Harris Teeter. No such vehicle arrived, but around the time the runner was expected, a black Ford SUV arrived and began circling the parking lot. The SUV did not stay parked but continued to circle the lot and park briefly in different spaces. Ms. Newsome notified Detective Little that the runner was unable to make contact and decided to leave, and right around that time, Detective Little observed the SUV exit the parking lot. Ms. Newsome asked the runner to return to the lot and told Detective Little that the runner would be back in

"four minutes." Just a few minutes later, the SUV returned to the parking lot.

¶ 4 After the SUV returned, the source told Ms. Newsome to meet the runner inside the Harris Teeter. Shortly thereafter, Defendant, the SUV's driver, exited the car and began walking to the Harris Teeter. Detective Little began to approach Defendant in his unmarked pickup truck. After getting closer, Detective Little turned on his blue lights to identify himself as a police officer. Defendant immediately began to run in the opposite direction of Detective Little. After Defendant refused Detective Little's orders to stop running, a chase ensued, which resulted in Detective Little taking Defendant into custody. Soon after Defendant was apprehended, Ms. Newsome texted Detective Little that her source was asking for an update on the transaction because the driver was no longer responding.

¶ 5 The Union County officers searched Defendant's person, finding a cigarette pack emptied of cigarettes but containing heroin. Thereafter, a K-9 on the scene alerted the officers to the presence of narcotics in the SUV. The officers conducted a search of the SUV, finding cash and heroin in the center console.

¶ 6 Defendant was indicted by a grand jury for trafficking in heroin by transportation, trafficking in heroin by possession, and maintaining a vehicle for keeping and selling heroin. On 17 September 2020, Defendant filed a Motion to Suppress, which was heard by the Honorable Jeffrey Carpenter on 6 November 2020. The trial court denied Defendant's motion at the hearing and in a written order dated

30 December 2020. The order's findings and conclusions are elaborated as needed below.

¶ 7 On 17 December 2020, about two weeks before the written order was filed, Defendant pled guilty to trafficking heroin by possession and was sentenced to 90 to 120 months in prison. Pursuant to a plea agreement, the other charges were dismissed. The judgment was entered on 17 December 2020, and Defendant subsequently gave oral notice of appeal. Defendant filed a Petition for Writ of Certiorari to this Court, and the State filed a Motion to Dismiss Defendant's appeal. Both the petition and motion were referred to this panel.

II. Petition for Writ of Certiorari

¶ 8 "An order finally denying a motion to suppress evidence may be reviewed upon an appeal from judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-979(b) (2021). Although not included in the statute by the legislature, our Supreme Court later added a notice requirement to N.C. Gen. Stat. § 15A-979(b). *See State v. Reynolds*, 298 N.C. 380, 397, 259 S.E.2d 843, 853 (1979). Under this requirement, a defendant will waive his right to appeal the denial of a motion to suppress unless he "give[s] notice of his intention to the prosecutor and to the court before plea negotiations are finalized[.]" *State v. Tew*, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990).

¶ 9 Here, the record does not reflect formal notice of Defendant's intention to appeal the denial until after the judgment was pronounced. Because Defendant did not notice his intent to appeal before plea negotiations were finalized, the State argues that Defendant waived his statutory right to appeal under N.C. Gen. Stat. § 15A-979(b).

¶ 10 Despite potentially failing to preserve his appeal as of right, Defendant has petitioned this Court to issue its writ of certiorari pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. §§ 7A-32(c), 15A-1444(e), and review the order denying his motion to suppress evidence. "A writ of certiorari and invocation of Rule 2 cannot be used to circumvent the Rules of Appellate Procedure." *State v. Ricks*, 2021-NCSC-116, ¶1, 378 N.C. 737, 738. "*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). Accordingly,

> an appellate court may only consider certiorari when the petition shows merit, meaning that the trial court probably committed error at the hearing. Further, an appellate court may only invoke Rule 2 when injustice appears manifest to the court or when the case presents significant issues of importance in the public interest.

Ricks, 2021-NCSC-116, ¶1, 378 N.C. at 738.

¶ 11 Here, Defendant has not shown that his argument is meritorious or that the trial court probably committed error. Therefore, we deny Defendant's petition for

writ of certiorari for the reasons below.

¶ 12 To establish the merit of his petition for writ of certiorari and reveal the errors he asserts were committed by the trial court, Defendant incorporates the arguments from his brief filed contemporaneously with this Court. In his brief, Defendant contends that the trial court erred by making four erroneous findings and failing to address in its findings (1) whether the officers attempted an investigatory stop before Defendant took flight, (2) Detective Little's testimony that Defendant was observed entering the grocery store before continuing to circle around the parking lot, and (3) the informant referred to the runner's vehicle as a brown Ford Taurus, not a dark colored Ford SUV.

¶ 13 In its order denying Defendant's motion to suppress, the trial court made the following undisputed findings of fact:

> 1. On or about November 18th, 2019, Detective [C.] Little was contacted by a confidential source of information, [Ms. Newsome.]
>
> 2. The confidential source of information reached out to Detective Little to inform him that she could set up a buy . . . .
>
> 3. The agreed upon location was the Harris Teeter on Idlewild Road. . . .
>
> 4. The confidential source of information in this case had been used five to ten times by Detective Little and had proven to be reliable based on previous actions and information relayed.

. . .

7. While at the Harris Teeter on Idlewild Road, Detective Little observed a black in color SUV in the parking lot of the Harris Teeter that moved around the parking lot in a way that drew his attention to the vehicle.

8. The dark in color SUV would park for periods of time and the occupant would not exit the vehicle. Instead, he would drive around the parking lot and park in different spaces.[1]

9. The dark in color SUV left the parking lot, at which time information was received from the confidential source of information that the runner had left due to having not made contact, but Detective Little was informed via text that the SUV would be returning within four minutes.

10. Within a short period of time thereafter, the dark in color SUV returned.

11. Information was relayed that the runner wanted to meet the confidential source of information inside of the Harris Teeter.

12. Detective Little observed a Hispanic male exit the dark in color SUV and start walking towards the entrance of the Harris Teeter.

13. The confidential source of information had described the runner that she would be meeting as a Hispanic male . . . .

14. Detective Little then approached the Hispanic male, Mr. Maldonado, walking towards the Harris Teeter in his

[1] Defendant takes issue with part of this finding, because Detective Little elaborated on cross-examination that at some point another investigator witnessed Defendant enter the grocery store and make a purchase. However, Detective Little also explained that Defendant's behavior of circling the lot and moving from one parking space to another resumed after this purchase.

> unmarked white pickup truck.
>
> 15. After approaching [Defendant] in his unmarked pickup truck, Detective Little activated his blue lights, at which time the defendant started running. Detective Little then commanded [Defendant] to stop.
>
> 16. [Defendant] did not yield to the authority of Detective Little but continued to run. Detective Little gave chase and eventually was able to chase [Defendant] down and tackle him.
>
> . . .
>
> 18. Based on the totality of the circumstances, the training and experience of the officers, and the determination that the movements of the dark in color SUV were suspicious, the information they had received from the confidential source of information was sufficiently accurate to give rise to a reasonable suspicion that the Hispanic male walking towards the front of the Harris Teeter was, in fact, the runner that the confidential source of information was to meet.

¶ 14 The trial court concluded that

> 2. . . . there was sufficient reasonable articulable suspicion to seize Mr. Maldonado.
>
> 3. . . . there was sufficient probable cause to search Mr. Maldonado and his vehicle.

¶ 15 Although the trial court mixed some conclusions of law with its findings of fact, the trial court's findings of fact ultimately support its conclusions of law. Defendant argues that the trial court erred by making erroneous and inadequate findings, as mentioned above. However, Defendant's arguments do not establish merit or reveal

an error warranting the issuance of a writ of certiorari. *See Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

¶ 16 Even assuming that the trial court made erroneous or inadequate findings, as Defendant alleges, Defendant has not met his burden to show that these errors had any prejudicial effect on the outcome of the suppression hearing. Based on the undisputed facts, the search and seizure of Defendant and his vehicle were at no point unconstitutional. First, under the totality of the circumstances, Detective Little and his accompanying officers had reasonable suspicion to believe Defendant was involved in criminal activity based on a reliable informant's tip, Defendant's suspicious driving around the grocery store parking lot, and Defendant's consistent behavior with the informant's tips and timeline. *See State v. Phifer*, 226 N.C. App. 359, 361, 741 S.E.2d 446, 448 (2013) ("[I]n North Carolina, an officer has reasonable suspicion if a reasonable, cautious officer, guided by his experience and training, would believe that criminal activity is afoot based on specific and articulable facts, as well as the rational inferences from those facts." (internal marks omitted)).

¶ 17 Second, the officers had probable cause to arrest Defendant for resisting an officer when he began to flee after Detective Little identified himself as a police officer and attempted to speak with him. *See State v. Washington,* 193 N.C. App. 670, 679, 668 S.E.2d 622, 628 (2008) ("The conduct proscribed under N.C.G.S. § 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an

officer in the discharge of his duties. For example, this Court has concluded that flight from a lawful investigatory stop may provide probable cause to arrest an individual for violation of N.C.G.S. § 14-223." (internal marks and citation omitted)).

¶ 18 Third, the officers lawfully searched Defendant's person incident to arrest. *See State v. Jackson*, 262 N.C. App. 329, 336, 821 S.E.2d 656, 663 (2018) ("An officer may conduct a warrantless search incident to a lawful arrest. A search is considered incident to arrest even if conducted prior to formal arrest if probable cause to arrest exists prior to the search and the evidence seized is not necessary to establish that probable cause." (internal marks and citation omitted)). As a result of this search, the officers discovered heroin, consistent with the informant's tips.

¶ 19 Lastly, after discovering the heroin on Defendant's person, the officers conducted a K-9 sniff of Defendant's car, alerting them to the presence of narcotics. The officers had probable cause to search the car considering the K-9 alert, the confidential informant's information, Defendant's suspicious behavior consistent with those tips, and the presence of heroin on Defendant's person. *See State v. Degraphenreed*, 261 N.C. App. 235, 241, 820 S.E.2d 331, 336 (2018) ("Under the motor vehicle exception, [a] police officer in the exercise of his duties may search an automobile without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile carries contraband materials." (internal marks and citation omitted)).

¶ 20 Defendant's arguments simply have no effect on the outcome of the trial court's suppression decision. Therefore, Defendant has failed to demonstrate that his appeal is meritorious, and in our discretion, Defendant's petition for writ of certiorari is denied.

III. Conclusion

¶ 21 In our discretion, we deny Defendant's petition for a writ of certiorari and dismiss this appeal. For the above reasons, the State's motion to dismiss the appeal is granted.

DISMISSED.

Judges DILLON and WOOD concur.

Report per Rule 30(e).